

12-1-2010

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Recommended Citation

Floyd Abrams, *Protecting the Heart of the First Amendment, Defending Citizens United*, 9 FIRST AMEND. L. REV. 193 (2018).
Available at: <http://scholarship.law.unc.edu/falr/vol9/iss2/2>

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PROTECTING THE HEART OF THE FIRST AMENDMENT, DEFENDING *CITIZENS UNITED*

FLOYD ABRAMS*

Thank you so much. It's a pleasure to be here. I really enjoyed the panel this morning. Indeed, I enjoyed it so much that I'm doing what speakers occasionally do, which is throwing away my speech and starting with the last question or one of the last things that was said in the panel discussion, in which Erik Jaffe raised the question of whether critics of the *Citizens United*¹ case really believed that organizations like the Sierra Club, or the NRA, or the ACLU, should be treated in a way which would bar them — if they otherwise chose to — from spending their money, advocating the election, or the non-election, of the candidates for federal office.

I thought in that respect we might start out by having a look at just what it was that Citizens United had to say — and then going on from there. Citizens United, as you know, is a conservative, very conservative, group, which takes positions on a variety of public policy matters, and not until this case, had achieved the notoriety that it has now. But it is a corporation. It accepts money from corporations, although the percentage of the money that it has, that has come from corporations, has been on the low side.

But, let's have a look at the very beginning of *Hillary: The Movie*,² which is a movie, a documentary of movie length, which they made and which they wanted to put on video on-demand. The statute in

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1. *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

2. *HILLARY: THE MOVIE* (Citizens United Productions 2008).

statute in question, remember, the Bipartisan Campaign Reform Act (BCRA),³ “McCain-Feingold,” barred corporations and unions from spending their money — let’s put aside PACs for the moment — their treasury funds on movies or anything else that would go on television, cable, or satellite, which would, given the law as of the time *Citizens United* was decided, which would advocate in clear terms the election or defeat of a candidate for federal office.

So this is the beginning now of *Hillary: The Movie*, which was produced so that it would be shown when she ran for president, when she was nominated. This group did not want Barack Obama rather than Hillary Clinton. They didn’t want either. Because Hillary was considered the likely, indeed the inevitable candidate, this was the beginning of the movie they made about Hillary.⁴

That’s what you get before the movie begins. I come to this area of law as someone who is not an election law expert, but someone who’s worked in the First Amendment vineyards and who’s come to views about the need for strong First Amendment protection. I guess I start with a problem. My problem is that while I see a strong social interest, not of constitutional dimensions, but nonetheless a strong social interest on the side of what I’ll call the reformers in avoiding political corruption, purifying elections, I just don’t see this as a close case.

While I give less credit than some to avoiding the “appearance” of corruption, which I think is so vague to be unacceptable as any sort of legal standard, there are serious policy concerns about the amount of money that certain people, certain organizations might spend on politics, the enormity of their potential control, *et cetera, et cetera*. And yet, for me, I have to confess, none of this makes this case close.

3. Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), Pub. L. No. 107-55, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 12 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

4. At this point, the first two-and-a-half minutes of *Hillary* were played for the audience. It consists of political commentators criticizing Hillary Clinton on a variety of topics. For more information on the film, see *Hillary: The Movie*, <http://www.hillarythemovie.com/index.htm> (last visited Mar. 2, 2011).

I start with the movie itself. It's inconceivable to me. I don't understand how so many people, particularly people with whom I usually share certain political views with can come to the view that this movie can be criminal if shown on television because it's paid for, and in this case, produced, by a corporation. This just seems to me to be the core, the absolute center of the First Amendment. While one can talk about distinguishing between a political — ideologically oriented group like this — and I'll come to that, and more traditional corporations, I am deeply concerned that the vote on the Supreme Court was as close as five to four in this case.⁵

Not because of the five. You can discount what I say, if you wish, because I represented Senator McConnell in the case, and I was one of the four counsel who argued in the case. But it seems to me so self-evident that political speech of that sort (and I voted for Hillary) political speech of that sort must be protected by the First Amendment. I'm not even arguing that to you. I am asserting it as a starting point of my analysis or really where I'm coming from with respect to campaign finance issues.

There are issues, such as disclosure, as to which I think there are a lot of closer issues and it was my view, which I recommended to Senator McConnell to be his view, that we should take the position in the case that the disclosure requirements were constitutional, if I were asked.⁶ But to me movie is itself, sort of a paradigmatic example of pure political speech — so I don't get it

5. Justice Kennedy delivered the opinion of the Court in *Citizens United*, and Chief Justice Roberts and Justices Alito, Scalia, and Thomas concurred. Justices Stevens, Ginsburg, Breyer, and Sotomayor concurred in part and dissented in part. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 886.

6. Abrams wasn't asked about this at oral arguments. The Court held that the disclosure requirements of the BCRA did not violate the First Amendment. *Id.* at ___, 130 S. Ct. at 913-16. The BCRA provided that "any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC." *Id.* at ___, 130 S. Ct. at 914. The Court noted that "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at ___, 130 S. Ct. at 916.

when people say that something like this can be overcome by other social interests, including the ones that I mentioned.

So my answer to the rhetorical query that Erik posed at the end of the first session today is a sort of "of course." Of course, we have to protect material like this. We have to protect the Sierra Club, and the NRA, and the ACLU, and all the public interest groups, left, right, center, whatever, in engaging what everyone agrees is the center of the First Amendment. Scholars have had arguments through the years about how far beyond political speech the First Amendment should go. Those of you who are old enough here to remember the Bork hearings will recall that then-Judge Bork, nominated for the Supreme Court,⁷ had written an article in the *Indiana Law Journal*, in the 1970s, arguing that only political speech should receive the protection of the First Amendment, not cultural, not artistic, not novels, not dance, none of those other areas which have long been held protected by the First Amendment.⁸ Bork later came to take a different position and changed his position on that issue.⁹

But on the starting point, on the notion that that sort of stuff that I just played for you is the single most important thing the First Amendment protects, and to put it a different way is the most important reason, by way of illustration, that we should continue to have a strong and strongly enforced First Amendment on issues such as that, there has historically been very little, if any dispute. One can argue, I suppose because it is argued, that those interests, those First Amendment interests can be overcome by other interests. I don't think they should be held to be overcome by it.

One of the things that has disturbed me in the aftermath of the *Citizens United* case is how often people have commented on it,

7. For a discussion of Robert H. Bork's nomination to the U.S. Supreme Court and the related committee hearings, see generally NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* (1998). In 1987, President Reagan nominated Judge Bork to fill Justice Powell's seat on the Supreme Court. *Id.* at 11-12.

8. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

9. Robert H. Bork, *Judge Bork Replies*, 70 A.B.A. J. 132 (1984).

on television, in the press, and the like without even acknowledging that Justice Kennedy's opinion is a First Amendment opinion.¹⁰ He may be wrong, but his opinion is, indeed only is, a First Amendment opinion. There is no case at all on the side of the majority, but for the First Amendment.¹¹

So my starting point to you is an expression of sadness that the dissenters in this case could not even bring themselves to say: Look, at least that movie has to be protected. We'll devise some sort of exception for public interest or political groups or the like. But even that is extremely difficult to draft. It's hard to start distinguishing between one sort of group and another, one speaker and another. Hard and probably unconstitutional. Suppose the film had been made by Time Warner and not Citizens United. We know this: On the face of the statute itself, there's a media exception.¹² Under the media exception, if Time Warner had made that movie and shown it on one of its channels, it would be protected. But not Citizens United?

Forget the media exemption. Is it not obvious that Time Warner would be protected by the First Amendment? And if so, how can Citizens United not be equally protected? We are speaking quite literally about the same speech, about the same documentary. Or suppose Professor Van Alstyne,¹³ whose presence here I'm so happy to see, suppose General Motors, instead of being a contributor to Citizens United had made the movie and it was called "General Motors presents *Hillary: The Movie*." Now they don't do that, and they never did. Not just GM, the big money corporations have never wanted to become involved in anything like that, if for no other reason than half the public would be furious at them. That is not what they do for a living. But suppose it had been made by General Motors. Can it be? Do we really think

10. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 876.

11. *Id.* at ___, 130 S. Ct. at 886-917.

12. *See id.* at ___, 130 S. Ct. at 905-06 (noting that the portion of the BCRA in question does not apply to media corporations).

13. Professor Van Alstyne had properly observed that General Motors was a contributor to Citizens United.

that the law can or should treat General Motors' *Hillary: The Movie* different than Time Warner's *Hillary: The Movie*?

My view, in any event, is that it should be treated the same and that we should look at, as a general proposition, at speech and not speakers, that there are exceptions to that. One of them was mentioned earlier today. Foreign money, foreign speech already is treated differently in the law.¹⁴ *Citizens United* doesn't change that. But that is a general proposition. In American law, in my view, it shouldn't make a difference who is speaking and who is not. We protect speech. We protect it, particularly political speech, and I think we should continue to do so. References were made earlier today to the Tillman Act,¹⁵ which at the very beginning of the Twentieth Century was a reform act, and which, among other things, barred corporations and unions from making political contributions. Now that still is the law. *Citizens United* doesn't change that at all. Political contributions, giving money to a candidate, are still banned for corporations and unions.

What is not banned, as a result of *Citizens United*, is companies or unions spending their money to put out a movie of their own. Take out ads on their own. Put out books, pamphlets, whatever, on their own. That's what's new. In those documents, they can overtly, on the face of it, advocate the election or defeat of a candidate for president. By the way, in the *Citizens United* case, one of the arguments that Citizens United made was that they really weren't saying don't vote for Hillary.¹⁶ The judges laughed too and that got no support in either of the courts that it was in.¹⁷

So I started by saying that when the Tillman Act was passed, contributions by these organizations were banned. It wasn't

14. 2 U.S.C. § 441e (2006) (barring foreign nationals from making campaign contributions or independent expenditures on electioneering).

15. Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified at 2 U.S.C. § 441(b)(2)) (barring corporations from making money contributions); War Labor Disputes Act, Pub. L. No. 78-89, 57 Stat. 163, 167 (1943) (extending the prohibition on contributions to unions).

16. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 890.

17. *Id.* "As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton." *Id.*

until the Taft-Hartley Act¹⁸ in 1947 that Congress said, in effect, these independent expenditures, money spent by corporations and unions out of their treasury funds, could not be spent — I'm oversimplifying — in ways that endorsed or attacked candidates for public office. From the start, it was a matter of great controversy whether that law was constitutional. Harry Truman vetoed the law, saying that section violated the First Amendment.¹⁹ In the first case that went to the Supreme Court in 1948, the Court said that unless we read this statute very narrowly, it would violate the First Amendment.²⁰

One of the things that has interested me the most is that the liberal jurists of the day were the ones then, in the late 40s into the 1950s, who were saying and saying in the clearest terms that we can't have statutes like this at all. These statutes, there is more than one of them, are unconstitutional on their face, they were saying. Not just as applied in a *Citizens United* case, but across the board, we cannot have statutes like this.

Let me read to you something that Justice Douglas said on behalf of himself, Chief Justice Warren and Justice Black, the three very, very strong pro-First Amendment voices on the Court at that time and no friends of corporations. He wrote:

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group — labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely

18. Labor Management Relations Act of 1947 (Taft-Hartley), Pub. L. 80-101, 61 Stat. 136 (codified at 29 U.S.C. § 141).

19. See William S. White, *Bill Curbing Labor Becomes Law As Senate Overrides Veto*, 68-25, N.Y. TIMES, June 24, 1947, at 1.

20. *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 141 (1948).

because we or the Congress thinks the person or group is worthy or unworthy.²¹

Now that was issued in a case in which the defendant, in a criminal case by the way, was a union. There was an incident, in which the head of the American Auto Workers was accused of the crime of putting out a pamphlet for the UAW, endorsing Franklin Roosevelt's reelection in 1944. There was an earlier statute, as well as a later one. But they both, in different words and with slightly different coverage, made illegal corporations or unions spending money in the way that I've been talking about.

I return to what I view as first principles. I think the idea that a union can't endorse someone running for office, endorse in so many words, we support X and take out an ad, saying it, seems to me to strike at the heart of the First Amendment. Now in the oral arguments in the case, as First Amendment aficionados around the room know, there were some very interesting exchanges.

The case was argued twice.²² The first time it was argued, counsel for the United States, Deputy Solicitor General Malcolm Stewart, was pressed very hard by members of the Court, as they do in all their cases, by the use of hypothetical questions. You know how it goes. A hypothetical question is asked. If it's really good, the lawyer tries very hard to somehow suggest to the Court that's really not what this case is about. The judge becomes angry because he knows that's not what the case is about.

Justice Scalia once said something to the effect of, "If I didn't know what the case was about, I shouldn't be here."²³ And then the lawyer has to answer. We do answer those questions. We try to escape, if we can, if the question is good enough. But, if it

21. *United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting).

22. The case was initially argued on March 24, 2009, and it was re-argued on September 9, 2009. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 876.

23. See Miriam Rozen, *Scalia Discusses Conjunctions, Contractions and Pet Peeves at Texas Bar Event*, TEX. LAWYER, June 29, 2009, <http://www.law.com/jsp/article.jsp?id=1202431829708> ("Scalia's pet peeve: when lawyers respond to a hypothetical example by saying it is 'not this case.' Going through his mind at that point, Scalia said, is the thought, 'I know it's not this case, you idiot.'").

finally comes down to it, where you know you'll be in more trouble for not answering than for answering in a way that may seem disturbing to a member of the Court, you answer. That's what you're supposed to do, and it's what you better do.

Here's the exchange. The lawyer was asked by Justice Alito, pressing the question, "You think that if — if a book was published . . . that could be banned?"²⁴ Here, Justice Kennedy also asked, "Just to make it clear, it's the government's position that under the statute, if this kindle device where you can read a book which is campaign advocacy, within the 60-30 day period, [which is close to the election, covered by the more recent statute] if it comes from a satellite, it's under — it can be prohibited under the Constitution and perhaps under this statute?"²⁵

Counsel said, "It . . . can't be prohibited, but a corporation could be barred from using its general treasury funds to publish the book and it could be required to use [a] . . . PAC,"²⁶ which you heard about this morning, a PAC is a sort of substitute for a corporation spending money; it permits corporate executives but not corporations themselves to do so. That answer didn't satisfy Justice Kennedy or other members of the Court.

Chief Justice Roberts: "Take my hypothetical. [A book] doesn't say at the outset."²⁷ Well, "whatever it is,"²⁸ I'm reading the literal text here. This is the way people really talk, as you're seeing. "[T]his is a discussion of the American political system, and at the end it says vote for X."²⁹ Mr. Stewart, Counsel to the United States: "Yes, our position would be that the corporation could be required to use PAC funds rather than general treasury funds."³⁰ Chief Justice Roberts: "And if they didn't, you could ban it?"³¹ Mr.

24. Transcript of Oral Argument at 27, *Citizens United*, 558 U.S. ___, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

25. *Id.* at 29.

26. *Id.*

27. *Id.* at 30.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

Stewart: "If they didn't, we could prohibit the publication of the book using the corporate treasury funds."³²

I wasn't in the courtroom that day, but people say, who were there, that there was what they call an audible intake of breath around the courtroom. Counsel for the United States was saying it can be a crime to publish a book! Well, the Court wound up ordering re-argument in the case. Then the new Solicitor General, now-Justice Elena Kagan, made her argument to the Court. And of course, the Department of Justice was well aware of the reaction of at least a significant number of members of the Court to the answer that Mr. Stewart had given. You can make it a crime to publish the book, so long as it says who to vote for. And they spent a lot of time trying to come up with an answer to the book question.

So when Solicitor General Kagan was asked the question, she was first asked by Justice Ginsburg: "[I]f Congress could say no TV and radio ads, could it also say no newspaper ads, no campaign biographies? Last time the answer was, yes, Congress could, but it didn't. Is that . . . still the government's answer?"³³ There was a slight pause and laughter in the courtroom as everybody waited for the answer. The answer was, yes. And then Solicitor General Kagan said, "we took . . . what the Court's . . . own reaction to some of those other hypotheticals [in these books] very seriously. We went back, we considered the matter carefully, and the government's view is that although [a particular portion of the law] does cover full-length books, that there would be [a] quite good as-applied challenge to any attempt to apply [the law] in that context."³⁴

For you non-lawyers and any of you here, "as-applied challenge" is just what it sounds like, a challenge to a particular use of a statute in a particular context, rather than just saying the whole

32. *Id.*

33. Transcript of Oral Re-argument at 64, *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf.

34. *Id.* at 65.

statute is unconstitutional. So she was saying if we really brought a prosecution against someone for publishing, a corporation for publishing a book, we think they'd have a quite good argument that that was unconstitutional.

And she went on then to say, "I should say that the [Federal Election Commission] has never applied [the statute] in that context."³⁵ Justice Scalia then said: "What happened to the overbreadth doctrine? I mean, I thought our doctrine in the Fourth [sic] Amendment area is if you write it too broadly, we are not [as a Court] going to pare it back to the point where it's constitutional. If it's overbroad, it's invalid. What has happened to that."³⁶ General Kagan: "I don't think that it would be substantially overbroad, Justice Scalia, [because] the FEC has never applied this statute to a book."³⁷

Chief Justice Roberts: "But we don't put our . . . First Amendment rights in the hands of FEC bureaucrats; and if you say that you are not going to apply it to a book, what about a pamphlet?"³⁸ To which she responded, "I think a . . . pamphlet would be different. A pamphlet is pretty [close to] electioneering, so there is no attempt to say that [the statute] only applies to video and not to print."³⁹

So the position of the government, then, was as to books, there's a pretty good constitutional argument that the statute couldn't apply. As to pamphlets, the statute does apply and would be constitutional. Now that's a hopeless answer. It's the best she could do because the question is so probing and the answer all but compelled. What else could she say? It is a hopeless answer because there's no distinction, no distinction at all, constitutionally; between a book and a pamphlet. You can have an electioneering book, a whole book about why to vote for someone or a whole movie about why to vote against someone, and be in pamphlet form or book form. Nor do I think it makes sense to try to distinguish books and

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 66.

39. *Id.*

pamphlets in one category from television, cable, satellite. Of course, I'm putting together here, as the Court did, hypothetical issues with real ones. People sometimes object to that. In the First Amendment area, we do it all the time, all the time. When we deal with First Amendment issues, we deal with what is the logical follow-up, what cases are going to be next year? Why do we oblige ourselves to sustain or strike down this law or strike that law down? That is the thought process the Court goes through in all of its cases. But in the First Amendment area, it is absolutely commonplace when you have a statute, such as the one argued two days ago — in that case, a jury verdict — the Marine funeral case.⁴⁰

So we have a case there, where someone brings a lawsuit, saying I'm entitled to sue and to recovery. To recover if a jury says so, as it did, in this obscene situation where a Marine is killed in Afghanistan and this group of people is picketing somewhere near the church with signs saying, in effect, that he deserved to die because the United States is being too soft, too accommodating to homosexuals.⁴¹

Put aside the madness of it. How does the Court approach a case like that? They're not going to have this case again. They have to think, if we allow recovery in this case, are we going to limit it to demonstrations near funerals? Are we going to limit it to this horrible case somehow? Is there some way that we can limit it in that way and do we want to try to do it that way? Will a decision be right, or not? And so here, it is the most natural commonplace sort of thing for justices to go through the sort of questioning because it tests the thesis, the theory, the approach of the lawyer before it. It's not at all unfair for someone approaching this question of what to do about this movie and whether it's constitutional to make it a crime for Citizens United to spend its money on this movie, to ask counsel to take the next step and talk about a book or a pamphlet.

40. Transcript of Oral Argument, *Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207 (2011) (No. 09-751), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-751.pdf.

41. *See Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *affirmed*, 562 U.S. ___, 131 S. Ct. 1207 (2011).

Now, it shouldn't make any difference at all whether it's a movie or a book. Conceptually, it ought not to matter. We happen, though, to have a longer experience with books than with anything else. And we have an experience in the world of books being burned, so that it resonates with particular power when we think of the notion of books being made criminal because they say something. But conceptually, it's the same thing.

So my own starting point is that the very notion of saying that speech of this sort can be made criminal runs into the wall of the First Amendment. Note that I use the word speech, not because there's an exact equation between money and speech, but because these laws ban the spending of money and the money is spent making a movie like this or making advertisements, such as you see on television in the ongoing political campaigns. So even if there's not an exact equation, one thing we know is that without money, you can't get a book out and you certainly can't get ads on television. So as I say then, bringing an overview to this case, which is not particularly election oriented, but much more First Amendment oriented, it seems to me that a statute such as the one that the Court considered was one of the most dangerous, most threatening, least defensible of statutes in the realm of First Amendment cases in recent years.

Compare it to cases in which the Court has made decisions, vindicating First Amendment rights. We were talking earlier, a few of us outside, about the *Stevens*⁴² case. A case involving these films, these sort of animal snuff films, showing animals, little animals being killed in a way I will not describe. Except that women do it, I want you to know, wearing high heels. And some men seem to find that attractive to watch. There's a market in watching animals being killed in a particularly outrageous way. Congress passed a law designed to deal with it. The constitutionality of the law went to the Supreme Court and by an eight-to-one vote, the Court said that the statute was constitutionally overbroad on First Amendment grounds and could not pass muster.⁴³

42. *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577 (2010).

43. *Id.* at ___, 130 S. Ct. at 1592.

Justice Alito dissented in that case, saying that what was at issue here was, in his words, “a form of depraved entertainment that has no social value.”⁴⁴ I was struck by that phrase because the majority, the eight person majority, said not a word disputing it. I’m sure it was their view too, that it had absolutely no social value at all. Indeed, without knowing, I presume to speak for them. I bet they would say it’s not just of no social value, it does some harm. The fact that we have movies like this encourages the people who make the films to kill the animals. Killing the animals is a crime everywhere.

But nonetheless, the Court made that ruling. The sort of liberal community, of which I still think I’m a member, basically applauded it. *The New York Times*, which I occasionally represent, but may not after the next sentence I’m about to utter, had an editorial, praising the Court’s opinion and contrasting it in the same sentence to the *Citizens United* opinion, which it said was a “reckless” opinion.⁴⁵ And my reaction is that’s a very reckless thing to say, intellectually reckless thing to say.

On the one hand, we have this speech, which the whole Court agreed, and I’m sure everyone would agree is not just bad speech, but harmful speech because it is so associated with the killing of the animals themselves. At the very least, in Justice Alito’s phrase, it was speech “that has no social value.”⁴⁶ I join the *Times* and media other organizations in supporting the *Stevens* ruling. It’s necessary to hold your nose sometimes and say, as the Court did, that’s what the First Amendment means. But to say that speech should be protected under the First Amendment and what you just saw in the *Hillary* movie should not be protected under the First Amendment seems to me absolutely unacceptable. One is what the First Amendment is about and the other is what we have to protect because if we start throwing out this speech and that

44. *Id.* at ___, 130 S. Ct. at 1592 (Alito, J., dissenting).

45. Editorial, *The Court and Free Speech*, N.Y. TIMES, Apr. 24, 2010, at A18, available at 2010 WLNR 8495828 (“That respectful treatment of the First Amendment, also reflected in the *Stevens* case, is what the nation needs from this court — not the recklessness of the ruling in the *Citizens United* case.”).

46. *Stevens*, 559 U.S. at ___, 130 S. Ct. at 1592 (Alito, J., dissenting).

speech and that speech, we'll wind up with too long a list, and Congress drawing the list, and we don't trust them to do it.

So that's where I'm coming from in this area. I want to close with a reference to the very first matter that I worked on in this area and preface it with the remark that by the very nature of campaign finance restrictions, there's always a close call, at the least with First Amendment invalidity. That's because you're almost always dealing with speech. Even if we want very much to limit, in some way, corporate spending, and even if we try not to think of it as a First Amendment matter, it's always in or around the First Amendment because this whole area is, of necessity, suffused with First Amendment interests.

The first matter I worked on was back in the 1970s. We had a different campaign finance law, also designed to try to protect against too much money coming in from too few people or institutions.⁴⁷ The issue there wasn't whether they were corporate or non-corporate. The law then limited how much candidates could spend and said that speech from third parties on behalf of candidates, even if not coordinated, not worked out in advance, would be counted against what the candidate was allowed to spend.

So if the candidate was allowed to spend \$1 million and I go off on a toot and start taking out ads, denouncing the candidate's opponents, and I spend \$100,000, that \$100,000 would be subtracted from the million. You want to try to find a way to keep the spending under control, if you want to do that. So what happened?

The American Civil Liberties Union put an ad in *The New York Times* about a month and a half before a congressional election in an off year.⁴⁸ President Nixon was president. The ad was filled with text about school busing of kids. It was a list of congressman the ACLU said we should honor for standing up to President Nixon and supporting the busing of kids from one area to

47. Federal Election Campaign Act of 1971, Pub. L. 92-225, 85 Stat. 3 (1972) (codified at 2 U.S.C. § 431).

48. *ACLU v. Jennings*, 366 F. Supp. 1041, 1042-43 (D.D.C. 1973), *vacated by sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975). For a more detailed recounting of the author's involvement in this case see FLOYD ABRAMS, *SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT* 235-37 (2005).

another, if necessary, to lead to some level of desegregation. They listed these congressmen.⁴⁹

Under the law, as it then existed, each congressman would have to deduct from the total amount the congressman was allowed to spend the amount attributable to that congressman, 1/131st of the cost of the ad, which was then, I don't know, \$15,000 or something.⁵⁰ Under the statute the newspaper, before it could publish the ad, had to get the information from the entity putting the ad in so that the law could be enforced. So what happened?

The ACLU said we're not going to give *The New York Times* the information. And *The New York Times*, in — what should I call it? — an ideological collaboration with the ACLU said well then, we can't publish the ad. So the ACLU sued.⁵¹ And they said the statute is unconstitutional.⁵² We can't get our ad in *The New York Times* unless we provide certain information we don't think we should have to provide. And the *Times*, and I did this brief and argument, took the position as an amicus curiae, friend of the court, supporting the ACLU, took the position we shouldn't have to demand the information.⁵³ We don't want that information. We shouldn't have to give it to you, Federal Election Commission or whatever it was then called.

Well, in those days, the liberals all thought we were all heroes. What a great thing to do. On a political level, it seemed to be anti-Nixon, so that was good. The conservatives, back then, were saying this is a good statute. There ought to be a way to make sure that not all this money is spent in an unaccountable way. And if you start endorsing 131 Democratic candidates, something ought to happen, and the statute was an okay way for it to happen. We did win the case.

What has happened? One of the things that has happened in the interim is that the ideological approaches have changed. If you want to be cynical, you can say that has nothing to do with the

49. *ACLU*, 366 F. Supp. at 1043.

50. *Id.*

51. *Id.*

52. *Id.* at 1053-54.

53. See *ABRAMS*, *supra* note 48, at 236-37.

First Amendment, but what each party, at a different time, thinks is in its interest, or what liberals or conservatives are more inclined to at one time than another.

One could argue that that quotation that I read to you by Justice Douglas was made in a case involving a union. Maybe the liberal jurist wouldn't have written that if it were a case involving a corporation, even though he said that he was talking about unions and corporations.⁵⁴ I don't think we can make these decisions, and I don't think we should, certainly not legally, based upon which side it seems to help or which movement seems a little more First Amendment oriented this year than last year because they think it's good for them or bad for them. The only thing we have to hold on to, it seems to me, is our notion of the First Amendment itself and that applies across the board. A case involving a union also affects corporations and in truth, cases involving unions and corporations, in fact, affect, for good or evil, all of us. How much speech is allowed in campaigns, even if it is sometimes as it is unequal in amount of who's speaking at which time, is something which is or ought to be of no moment at all if we really believe in the First Amendment.

So my message, particularly to the students here is that we have to continue to fight very hard to apply the First Amendment on an even keel, regardless of which ideological groups favor or disfavor the speech of one or another entity, regardless of whether it winds up helping one party or another. I tried to have a look at who was spending money after, and maybe as a result of, *Citizens United*. It's very hard to know, in part a reason that was referred to earlier today, which is that while there are disclosure requirements under the statute that was at issue in *Citizens United*, and we have that data, there's very little by way of disclosure required by statute, with respect to certain groups to which money has been flowing.

54. See *United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting) (explaining that it was not consistent with the First Amendment to prohibit a group, whether "labor or corporate," from expressing its views simply because it is "too powerful, because it advocates unpopular ideas, or because it has a record of lawless action").

So, what have we seen so far? So far, in terms of money that has been spent directly by corporations and unions, unions appear to have spent more. Directly, I mean an ad saying the CIO such and such, the pipefitters union such and such, a particular corporation, *et cetera*, the unions appear to have spent more. We do not, and I never thought we would, see a situation in which the large American corporations would be putting on ads, endorsing or attacking candidates for office. What has been happening is that a considerable amount of money, we don't yet know how much and we don't yet know enough about by whom, has gone to some of these 501(c) organizations. So you do have a good deal of money, at least, being spent on campaigns in a way, which in all likelihood benefits the Republicans quite a bit more than the Democrats.

Last question, what should we make of that? Should we be unhappy? Should we think we need to do something about the fact that corporate money, with respect to some of these 501 entities has been going to these organizations, which winds up in a manner where there's no disclosure where the money is from, and it's hard even to know exactly how much money.

In general, I'm in favor of more disclosure requirements, although these are obvious First Amendment limits on disclosure in circumstances in which it will inhibit the exercise of First Amendment rights. That was referred to earlier, one of the great NAACP cases of some years ago.⁵⁵ But as a general proposition, I think there should be more disclosure than we have now, and it ought to be in these areas that we have little information. Is it a bad thing to have more money going into politics, even if the money is corporate money or union money, or if you want to make it more pejorative sounding, big corporations and powerful unions? I don't think so. I see dangers in it. But I think that the First Amendment answer, and not just now, has to be that more speech, especially about politics, is good rather than bad. While we need to know more about who's speaking, who's really speaking, and how much they're spending, we ought not to have government involved beyond that.

55. NAACP v. Alabama, 357 U.S. 449 (1958).